

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Name]
Grievant

Record of Proceedings
Case No. 94-84

and

Date: March 25, 1996

Agency for International Development

DECISION
(Excision)

For the Foreign Service Grievance Board:

Presiding Member:

James C. Oldham

Board Members:

Michael Gould
Barry Sidman

Special Assistant:

Douglas P. Broome

Representative for the Grievant:

Self

Representative for the Agency:

Mary Anne Conboy
Director
Labor Relations Staff

Employee Exclusive Representative:

American Foreign Service
Association

DECISION (Excision)

I. THE GRIEVANCE

Grievant [name] is one of 11 Senior Foreign Service officers who contested their involuntary retirement from the Agency for International Development (USAID) in 1994 due to expiration of their time-in-class limitation (TIC).¹

When the agency failed to issue a decision in his grievance filed on July 17, [year], [name] appealed to this Board on December 14, [year]. Like the other grievants, he alleged that his separation was contrary to law and regulation because the agency failed to submit his name to the 1992 Consolidated Selection Board (the C/Board) for a recommendation of whether or not the agency Administrator should grant him a limited career extension (LCE) of his TIC. He asserted that agency regulations required it to review Senior Foreign Service officers for LCEs in each of their last two years of TIC but that he received only one review, in 1993. The alleged agency error resulted in his subsequent separation through mandatory retirement, he claimed. Grievant sought reinstatement and back pay, as well as the immediate assignment of himself and his wife (also a member of the Foreign

¹ The Foreign Service Act of 1980 provides in section 607 for mandatory time-in-class (TIC) limits, at the expiration of which a member of the service will be involuntarily retired. Section 607(b)(2) authorizes agency heads to grant a limited career extension of TIC to Senior Foreign Service officers, for periods not to exceed five years.

Service) to a post where he would be the mission director and she would occupy a position suitable to her experience and grade. Alternatively, he requested three years of extra service credit towards his annuity, or a cash payment of \$131,040.25 if service credit was not possible.²

II. BACKGROUND

In an interim decision dated January 26, 1995, the Board held that the agency had committed a procedural error in failing to review them for LCEs in 1992 and that this error may have been a factor in the agency separation actions against them. In accordance with 22 CFR 905.1(c), the Board granted the agency the opportunity to submit evidence and argument as to whether it would have taken the same action with regard to the grievants had the procedural error not occurred. The agency then convened a reconstituted 1992 C/Board, to which it submitted the LCE grievants' names, along with the names of other eligible officers within two years of their TIC expiration in 1992. The reconstituted Board, using the same criteria that would have been applied by the original 1992 C/Board, recommended several of the grievants for LCEs. [Name] was not among them. Accordingly, the agency concluded

² In his final submission to the Board dated February 14, [year] grievant protests his failure to receive an LCE in 1993, despite the positive recommendation of the C/Board. He did not raise this claim before the agency in his July 17, [year] grievance or his December 14, [year] appeal to the Board. It is untimely, and will not be considered here. In any event, in Cases Nos. 94-59 and 94-60 the Board concluded that the USAID Administrator was not required by law to grant LCEs only according to the rank-ordered recommendations of a selection board.

that the preponderance of the evidence demonstrated that he would not have been granted an LCE had he been considered for one in 1992.³

III. BOARD DECISION IN 1992 LCE GRIEVANCE

The Board reviewed the case of a grievant who was recommended for an LCE by the Agency's reconstituted 1992 C/Board in its decision of February 16, 1996 in Case No. 94-59. The Board found that even had the grievant been reviewed and recommended by the original 1992 C/Board, the USAID Administrator would not have granted him an LCE that year. This was because the grievant's TIC did not expire until 1994. The Agency's policy was to grant LCEs only to officers whose TIC expired in the year subsequent to the one in which the C/Board met. Therefore, only officers whose TICs expired in 1993 would have received LCEs in 1992. The Board found this policy to be consistent with the governing statute (The Foreign Service Act) and with its regulations, as well as reasonable in light of budgetary and other agency management considerations. The Board also ruled that the Administrator was not required by statute to grant LCEs in accordance with the rank order recommended by the LCE selection board, and had discretionary authority to deny an LCE to an employee whose name appeared on the recommended list.

³ USAID also concluded that grievant's failure to request prescriptive relief made his retirement voluntary and he was therefore ineligible for employment and/or employment-related relief. This view of grievant's standing to appeal was rejected in Case No. 94-59.

The Board denied the grievance, finding that the agency had proved it would have taken the same action *vis-à-vis* the grievant (*i.e.*, separation) even in the absence of its procedural error of failing to place his name before the 1992 C/Board. An excised copy of the decision in Case No. 94-59 is attached.

IV. DISCUSSION AND FINDINGS

We have reviewed the circumstances of the current grievance in the light of the findings and decision in Case No. 94-59. In that case, and in others where the employees had been recommended for LCEs by the reconstituted 1992 C/Board, we held that the preponderance of the evidence indicated that they would not have been granted an LCE that year, even if they had been considered then. As discussed above, we looked to their TIC expiration dates and the agency's policy with respect to employees in their category (defined by the TIC expiration date). We also found that individual qualifications and assignment considerations would not have been material to the Administrator's decision.

Grievant [name], unlike the grievant in Case No. 94-59, was not recommended for an LCE by the reconstituted C/Board. Faced with that fact, he argues that the reconstituted board was "not a satisfactory substitute" for the original board. He speculates that the members of the reconstituted board knew that he had not been granted an LCE in 1993, that they may have disqualified themselves from considering his file, and that a decision on

his LCE may have been made solely by the Public Member—which he asserts would hardly be an acceptable proposition. He also states his belief that one member disliked him, and that his reconstituted board was a “lemon.”

Even if grievant’s claims about the composition and conduct of the reconstituted C/Board had some evidentiary foundation (and his allegations and speculations do not provide it), they would at best lead to the conclusion that grievant would have been recommended for an LCE by a fairly constituted “substitute” board. But that would place him in a position identical to the grievant in Case No. 94-59, where we held that the agency would not have granted him an LCE despite a positive recommendation by the 1992 board.

In sum, we conclude that grievant’s separation was not contrary to law or regulation.

V. DECISION

The grievance is denied.